(4)

No. 95-1605

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ, AND MARIO PEREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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8 pp

TABLE OF AUTHORITIES

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1. Respondents do not dispute that the courts of appeals are divided on the question presented by the petition—whether a court has authority to order a sentence imposed under 18 U.S.C. 924(c) to run concurrently with a state-law sentence that the defendant is already serving. As the Tenth Circuit conceded (Pet. App. 10a), every court of appeals that has considered the question presented by the petition has disagreed with the conclusion reached by the Tenth Circuit in this case.

Respondents nevertheless contend that "there is no real need for this Court to intervene" (Gonzales Br. in Opp. 3), because the decision below is "narrow" (*ibid.*; Hernandez-Diaz Br. in Opp. 12) because it deals

only with defendants who have previously been prosecuted in state court. It is not uncommon, however, for defendants who are prosecuted in federal court to be subject to undischarged state sentences. Indeed, that is demonstrated by the decisions from other circuits with which the Tenth Circuit expressly disagreed.

In addition, the Tenth Circuit's analysis is not obviously confined to prisoners serving state sentences. The Tenth Circuit determined, without any support in the statutory language, that Congress's "stated intent" was that a Section 924(c) sentence must be served before any other sentence. Pet. App. 16a. From that premise, it reasoned that Section 924(c) sentences may be made concurrent "with a state sentence that is already being served," *ibid.*, because in those cases it is not possible to comply with Congress's purported intent that the Section 924(c) sentence be served first. The same reasoning would also lead to the conclusion that a Section 924(c) sentence may run concurrently with any *federal* sentence that the defendant already is serving. The result of the court of appeals' analysis may be, therefore, that, in the Tenth Circuit, Section 924(c) sentences can run consecutively only to sentences that are imposed at the same time when the defendant is sentenced for the Section 924(c) offense. Such a rewriting of the expansive language that Congress chose for this important criminal statute warrants correction by the Court.

2. Respondents devote the bulk of their arguments to a defense of the decision below. The court's reasoning, however, cannot be reconciled with the text of the statute.

Respondent Hernandez-Diaz contends (Br. in Opp. 4-5) that *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599 (1994), supports the court of appeals' decision, because that case interpreted the phrase "arrest * * * [by] any law-enforcement officer" in 18 U.S.C. 3501(c) to refer only to arrests effected for violations of federal law. That contention is wrong. *Alvarez-Sanchez* specifically held, relying on the plain meaning of the word "any," that the phrase "any * * * officer" includes "federal, state, or local" officers. 114 S. Ct. at 1604. The Court's conclusion that Section 3501(c) refers only to arrests for violations of federal law relied on the statute's textual concern with "delay" in bringing an accused before a judge authorized to grant or deny bail for "offenses against the laws of the United States or of the District of Columbia." 18 U.S.C. 3501(c); *Alvarez-Sanchez*, 114 S. Ct. at 1603-1604. The Court explained that such "delay" cannot occur until there is a "duty" to present a person to a federal magistrate, and that the "delay" covered by Section 3501(c) therefore requires an arrest for a federal crime. 114 S. Ct. at 1604.

No similar contextual limitation on the phrase "any other term of imprisonment" justifies imposing a "federal crime" gloss on the last sentence of Section 924(c). Indeed, as we have pointed out (Pet. 9-10), language limiting the broad sweep of the word "any" to federal crimes is found in the first sentence of Section 924(c), thus demonstrating Congress's ability to express such a restriction when it so desires. The Tenth Circuit erred when it imported the same "federal crime" limitation into the last sentence of Section 924(c). See, *e.g.*, *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994) ("[w]here Congress includes particular language in one section of a statute but omits it in an-

other section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); accord *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991).

Respondent Hernandez-Diaz is not assisted by the rule of lenity. Br. in Opp. 6-9. That rule "applies only when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States* v. *Shabani*, 115 S. Ct. 382, 386 (1994); see also *Reno* v. *Koray*, 115 S. Ct. 2021, 2029 (1995). Respondent's view that Section 924(c) is ambiguous is based on his claim that "the strongest indication of Congress' intent" (Hernandez-Diaz Br. in Opp. 7-8) is found in the 1984 Senate Committee Report that reflects an expectation that Section 924(c) sentences be served before other sentences. As we have explained (Pet. 12), however, Congress did not enact textual requirements in Section 924(c) regarding the sequence in which sentences under that Section and other sentences shall be served; it required only that they not run concurrently. Legislative history regarding the Committee's intent cannot create "ambiguity" in clear statutory language.

Nor have respondents' supported their claim that applying Section 924(c) as written would lead to absurd results, because their sentences would be "unreasonably harsh and unjust." Hernandez-Diaz Br. in Opp. 8; see also Gonzales Br. in Opp. 8. There is nothing "absurd" in requiring lengthy terms of incarceration for defendants who use firearms in the commission of dangerous felonies and who are already subject to other prison sentences. That conclusion is not changed by the fact (Hernandez-Diaz Br. in Opp. 7; Gonzales Br. in Opp. 7-8; Perez Br. in Opp. 3) that

respondents' state convictions and sentences arose from the same events that led to their federal prosecutions. The permissibility of such cumulative prosecutions and punishments has long been established, see, *e.g.*, *Abbate* v. *United States*, 359 U.S. 187 (1959), and Congress must be deemed to have been aware of that "commonplace[]" feature of our federal system when it enacted Section 924(c). *Callanan* v. *United States*, 364 U.S. 587, 594 (1961); see also *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988).*

Finally, respondents contend that the result below is supported by Sentencing Guidelines § 5G1.3, which they contend would require a concurrent sentence in the circumstances of this case. See Hernandez-Diaz Br. in Opp. 9-11; Gonzales Br. in Opp. 8-10; Perez Br. in Opp. 4-5. As we have already explained (Pet. 11), however, that Guidelines provision simply implements 18 U.S.C. 3584(a), the general statute that addresses the subject of concurrent and consecutive sentences. The specific mandate of Section 924(c)

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* Indeed, the 1984 amendments to Section 924(c) cannot be squared with respondents' argument. Those amendments were principally intended to repudiate *Busic* v. *United States*, 446 U.S. 398 (1980), and *Simpson* v. *United States*, 435 U.S. 6 (1978), where this Court had held Section 924(c) inapplicable when the underlying offense provided its own enhancement provision for use of a dangerous weapon in the commission of the offense. After the 1984 amendments, Section 924(c) requires a consecutive sentence even when the defendant has already been prosecuted and sentenced for another offense that carries an enhanced punishment because of the use of the same firearm. Given that the entire point of the 1984 amendments was to ensure cumulative punishments under Section 924(c) and any other crime that the defendant committed at the same time, respondents' plea that such result is "absurd" is particularly strained.

controls over the general provisions of Section 3584(a) not only under elementary canons of construction, see *Gozlon-Peretz*, 498 U.S. at 407; *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987), but also because Congress expressly provided that "[n]otwithstanding any other provision of law" sentences under Section 924(c) must be consecutive to "any other term of imprisonment." 18 U.S.C. 924(c). That direction expressly displaces the statutory provisions on which respondents rely.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

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JUNE 1996